

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP35-CR

Cir. Ct. No. 2010CF3497

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERICK ROMERO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH and MEL FLANAGAN, Judges. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Erick Romero appeals from a judgment of conviction on one count of burglary while armed with a dangerous weapon and one count of substantial battery, and from an order denying his postconviction

motion for resentencing based on a new factor.¹ We agree with the circuit court that Romero's apparent deportation is not a new factor and, therefore, we affirm the judgment and order.

¶2 Romero is a native of Mexico and, at some point, entered the United States without documentation. In July 2010, while extremely intoxicated, Romero broke into his ex-girlfriend's house and stabbed her once in the chest with a small knife. He was charged with one count of burglary while armed with a dangerous weapon, substantial battery, and violating a restraining order. In exchange for his no-contest plea to the first two charges, the third was dismissed and read in. In December 2010, Romero was sentenced to a total of four years' initial confinement and four years' extended supervision.

¶3 In December 2011, the Department of Homeland Security issued a "Notice of Intent to Issue a Final Administrative Removal Order" to Romero based on the conviction. In response to the notice, Romero indicated he would not contest removal, and asked to be sent to Mexico City upon deportation. In November 2012, Romero moved the circuit court for sentence modification, claiming the fact that he "will likely be removed from the United States upon completion of the confinement portion of his sentence" is a new factor.

¶4 The circuit court denied the motion. It concluded that the possibility of deportation played no role in sentencing, which had been based on the seriousness of the offense and the need for community protection. Thus,

¹ The Honorable Mary M. Kuhnmuensch accepted Romero's pleas and imposed sentence, resulting in the judgment of conviction. The Honorable Mel Flanagan entered the order denying the postconviction motion.

deportation was not highly relevant and was not a new factor for modification purposes. Romero appeals.

¶5 A “new factor” is a fact “‘highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence because, even though it was then in existence, it was unknowingly overlooked by all of the parties.’” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether something constitutes a new factor is a question of law we review *de novo*. See *Harbor*, 333 Wis. 2d 53, ¶33. Whether a new factor justifies sentence modification is committed to the circuit court’s discretion. See *id.*

¶6 Romero asserts that his pending removal is highly relevant to sentencing because he “will not serve the extended supervision portion of his sentence,” which works to defeat the circuit court’s sentencing objectives. He further contends that the circuit court “erect[ed] an impossibly high barrier” when it ruled that his deportation was not a new factor because it was not considered at sentencing. The State responds that Romero’s notice from the federal government does not conclusively show he will be deported and, in any event, there is no new factor because the circuit court knew that Romero could be deported.

¶7 We agree with the State that Romero’s deportation is not a new factor, though for slightly different reasons. First, Romero mischaracterizes the circuit court’s postconviction ruling. It did not hold that deportation was not a new factor simply because it was not considered at the original sentencing. Rather, it ruled that the key factors on which the circuit court opted to base its sentence were the seriousness of the offense and the need to protect the public.

Deportation, whether likely or not, was simply not a factor that the sentencing court believed merited consideration in its fashioning of the sentence.

¶8 More significantly, it is obvious that the circuit court was aware at the time of sentencing that conviction of a non-citizen could result in that person's deportation. It warned Romero of this possibility at the plea colloquy, as it was required to do, and it warned him a second time at sentencing when it cautioned him that "if you are not a citizen of this country, these criminal convictions can impact your citizenship by either deportation or denying your right to become a citizen of this country." At best, Romero might have a claim that his immigration status as a non-citizen is a new factor that was unknown to the circuit court when it imposed sentence. This argument would, however, ultimately fail, because even assuming that the circuit court was unaware of Romero's status at sentencing, his undocumented status "was then in existence" and known to at least Romero, so it could not be a new factor.

¶9 Because we conclude that Romero's possible deportation is not a new factor, we need not decide whether, in its discretion, the circuit court should have concluded that resentencing was warranted. *See id.*, ¶38 (if court determines there is no new factor as a matter of law, it need not continue its analysis).

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

